

118 CMR 6.00: FORMAL COMMISSIONERS' INVESTIGATIONS

Section

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6.01: Scope and Purpose

118 CMR 6.00 establishes the requirements for initiation and conducting of a Formal Commissioners' Investigation, the actions to be taken as a result of the conducting of such investigation and the requirements for the delay or deferral of a Commissioners' Investigation.

6.02: Initiation

- (1) Pursuant to M.G.L. c. 19C, § 8, the Commission by a majority vote of the Commissioners may initiate a formal investigation which shall be referred to as a Commissioners' Investigation when:
 - (a) upon completion of an investigation pursuant to M.G.L. c. 19C, § 5, where the caretaker of the person with a disability is a state agency and the investigation report finds that the allegation of abuse is substantiated; or
 - (b) at their discretion, the Commissioners determine that the best interests of persons with disabilities would be served by the initiation of such an investigation to ascertain the scope, remedy for and recommendations regarding abuse of persons with disabilities whose caretaker is a state agency.
- (2) In determining whether to initiate a Commissioners' Investigation, the Commissioners shall consider:
 - (a) possible duplication of investigations;
 - (b) the best interests of the particular person(s) with a disability(ies) involved; or
 - (c) the best interests of persons with disabilities in general.

6.03: Requirements of a Commissioners' Investigation

A Commissioners' Investigation shall include:

- (1) The investigation requirements enumerated in 118 CMR 5.02; and
- (2) An investigatory hearing, unless it is determined by a majority vote of the Commissioners, following an investigation and a review of the results of the investigation, that a hearing is not required; and
- (3) Any other measures determined by the Commissioners as appropriate for and not plainly irrelevant to the investigation.

6.04: Investigatory Hearings

- (1) Conduct of Investigatory Hearings.
 - (a) The attendance of at least two Commissioners, which shall be a quorum, shall be required to conduct an investigatory hearing pursuant to this provision.
 - (b) The Commissioners shall preside over the process of conducting investigatory hearings pursuant to M.G.L. c. 19C, § 8 and 118 CMR. The Commissioners shall:
 - 1. determine the parties to each hearing;
 - 2. determine which evidence they wish to consider;
 - 3. receive evidence; and
 - 4. determine the conduct and scope of such hearing; and

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5. make findings at the conclusion of the hearing based upon the preponderance of evidence presented.
 - (c) General Counsel for the Commission shall represent the Commission at said hearings and shall act at the direction of the Commissioners.
 - (d) Unless an emergency investigatory hearing is convened by a majority vote of the Commissioners, in which case 72 hour telephone notice shall be given to all the parties enumerated in 118 CMR 6.04(2)(a), the Commission shall give written notice of an investigatory hearing at least ten business days prior to the commencement of the hearing.
 - (e) Unless otherwise required by 118 CMR, notice of said hearings shall be made:
 1. by posting said notice at the office of the Secretary of State of Massachusetts;
 2. by certified mail to required parties and to the General Counsel for the Executive Office of Health and Human Services; and
 3. by mail to federal protection and advocacy agencies for the developmentally disabled and the mentally ill which file with the Commission a request to be so notified.
- (2) Parties to Investigatory Hearings.
- (a) Required parties to investigatory hearings shall be as follows:
 1. a representative from the state agency that provided services to the person(s) with a disability(ies) at the time of the alleged abuse;
 2. a representative from the state agency which is providing services to the person(s) with a disability(ies) at the time of the hearing, if different from that state agency providing services to the person(s) with a disability(ies) at the time of the alleged abuse;
 3. a representative from the referral agency which performed the initial investigation of the initial report of abuse, if not the Commission; and
 4. any other person or entity that the Commissioners, in their discretion, determine may provide relevant information to the Commission regarding the matter under investigation.
 - (b) Other interested parties may be allowed to participate in the hearing at the discretion of the Commissioners under such terms and conditions as the Commissioners may determine appropriate.
 - (c) The failure of a required party to attend a hearing after receiving notice shall not prevent a hearing from proceeding; however, the Commissioners may determine not to proceed without the absent required party.
- (3) Testimony.
- (a) Testimony taken at investigatory hearings shall be recorded by the Commission, either by electronic or video recording device or stenographic method. All other recording or transcription of hearings shall be prohibited unless specifically authorized by the Commissioners after a written request made to them at least two business days prior to the commencement of the hearing.
 - (b) At the discretion of the presiding Commissioners, testimony at any hearing may be taken under oath.
- (4) Witnesses.
- (a) Prior to testifying, each witness called by the Commission shall be given a copy of the 118 CMR 6.00 and any protocols and procedures published thereto.
 - (b) Each witness shall have the right to be represented by counsel at a hearing.
 - (c) Each witness may refuse to submit evidence or give testimony if such evidence or testimony could tend to incriminate him or her, but witnesses who are mandated reporters who refuse to submit evidence or to give testimony unless a response to a question could be used against him/her in a criminal proceeding, shall have his/her failure to cooperate reported to the person's supervisor and to the appropriate state agency for possible disciplinary action including, but not limited to, suspension with or without pay and termination under that agency's regulations or pursuant to the provisions of any collective bargaining agreement or any other contract.
- (5) Evidence.
- (a) The rules of evidence observed by courts shall not be observed in any hearing conducted pursuant to M.G.L. c. 19C and 118 CMR; however, subject to the exemptions contained in M.G.L. c. 19C, § 5(1), the rules of privilege as recognized by law shall be observed.

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- (b) Unless it is determined by the Commissioners that such disclosure is required to carry out the responsibilities of M.G.L. c. 19C, all personally identifiable and confidential information shall not be revealed at a hearing.
- (c) If the Commissioners determine that in course of the hearing disclosure of personally identifiable or confidential information will occur, the Commissioners or their designee shall:
 - 1. give notice ten business days prior to the commencement of the hearing to the person whose data will be disclosed or to his/her authorized representative of the Commission's intent to disclose personally identifiable or confidential information; and
 - 2. give that person or authorized representative an opportunity to object to the disclosure prior to the commencement of the hearing;
 - 3. presume that the person has no objection to such disclosure if the person fails to affirmatively notify the Commission of his/her objection regarding the disclosure of such information within five business days of being notified by the Commission.
 - 4. seek a judicial determination regarding the proposed disclosure if the affected person is disabled and deemed by the Commission to be incapable of exercising his/her rights to object to such disclosure and there is no authorized representative or the authorized representative is the identified abuser;
 - 5. not disclose the information if the person with a disability, authorized representative or the Court, as the case may be, expressly objects to the disclosure;
 - 6. insure to disclose as little information as is necessary in the event disclosure of personally identifiable or confidential information is made during a hearing; or
 - 7. may vote to go into executive session in accordance with the provisions of M.G.L. c. 30A, §§ 11A and 11A½, (Open Meeting Law), and the requirements of M.G.L. c. 19C, § 3 and M.G.L. c. 19C, § 8 in order to consider the reputation, character, physical condition or mental health of an individual.

6.05: Actions Following a Commissioners' Investigation

- (1) Commissioners' Investigation Report.
 - (a) Upon completion of the investigative activities of the Commissioners' Investigation including the conducting of a hearing, if one is held, a report shall be prepared by the staff of the Commission and shall be known as the Commissioners' Investigation Report.
 - (b) Unless otherwise determined by the Commissioners, a Commissioners' Investigation shall be completed and the Commissioners' Investigation Report shall be issued within a reasonable time from the date on which the Commissioners initially authorized the investigation.
 - (c) The requirements enumerated in 118 CMR 5.02(3)(b) shall apply to a Commissioners' Investigation Report.
 - (d) Upon its approval by the Commissioners, the report with an Executive Summary appended shall be issued by the Commission.
- (2) Other Actions to Be Taken. Upon the completion of a Commissioners' Investigation and the issuance of the Commissioners' Investigation Report, the Commission shall:
 - (a) insure that the matters contained therein, if appropriate, be referred to the Commission's Oversight Unit for protective service monitoring.
 - (b) take all other appropriate actions, consistent with the provisions of M.G.L. c. 19C, § 3, to have the recommendations contained in the Commissioners' Investigation Report implemented, including but not limited to, those referral activities enumerated in M.G.L. c. 19C, § 9, referral to all parties to the Commissioner's investigation, to the Commissioner of the public agency that licensed or approved the service provider against which there is reason to believe that professional misconduct has occurred, to the Commissioner of the public agency that has licensed or approved the service provider for state funding, to the Federal protection and advocacy agencies for the developmentally disabled and persons with mental illness in Massachusetts; and to the Secretary of the Executive Office of Health and Human Services.

6.06: Delay or Deferral of Commissioners' Investigation

- (1) The Commissioners may determine, in their discretion, based upon the standards enunciated in M.G.L. c. 19C, § 12, to delay or defer the commencement of a Commissioners' Investigation pursuant to M.G.L. c. 19C, § 8 and 118 CMR 6.00 because they have determined that said Commissioners' Investigation would duplicate or jeopardize an investigation then being conducted by law enforcement officials or that of another agency of Massachusetts. If a determination is made to delay or defer the commencement of a Commissioners' Investigation, the Commissioners will notify the Secretary of the Executive Office of Health and Human Services of said determination.
- (2) The delay or deferral of Commissioners' investigations pursuant to M.G.L. c. 19C, § 12 can occur only after the Commission has determined that:
 - (a) appropriate protective services have been provided to insure the continued safety of the alleged victim from further risk of harm;
 - (b) the delay or deferral will not adversely affect the on-going provision of protective services nor the health and safety of persons with disabilities found at risk of harm;
 - (c) the Commission's ability to conduct a later investigation will not be unreasonably impaired; and
 - (d) the investigation of the incident by another official or agency will be conducted in good faith by an impartial, qualified investigator.
- (3) If such determination to delay or defer the commencement of a Commissioners' Investigation is made, the Commission shall exercise its monitoring responsibilities pursuant to M.G.L. c. 19C, §12 on a continuing basis until the conclusion of and issuance of a report in such other investigation.

REGULATORY AUTHORITY

118 CMR 6.00: M.G.L. c. 19C, §§ 3(b), (e), (h), 8, 9 and 12.